

DE 03-078

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition of Wausau Papers of New Hampshire

Prehearing Conference Order

O R D E R N O. 24,154

April 7, 2003

APPEARANCES: Gallagher, Callahan & Gartrell, P.A. by Seth L. Shortlidge and Donald J. Pfundstein for Wausau Papers of New Hampshire, Inc.; Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; Office of Consumer Advocate by Michael W. Holmes, Esq. on behalf of residential ratepayers; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

This case is an outgrowth of Docket No. DE 03-064, in which the New Hampshire Public Utilities Commission (Commission) approved a special contract between Public Service Company of New Hampshire (PSNH) and Fraser N.H. LLC, owner of a paper mill in Gorham and a pulp mill in Berlin. See Order No. 24,151 (March 31, 2003). Wausau Papers of New Hampshire, Inc. (Wausau) is the owner of a paper mill in Groveton. On March 20, 2003, Wausau made a filing in Docket No. DE 03-064 in which it indicated support for the proposed Fraser special contract but took the position that various statutory and constitutional provisions require the Commission to order PSNH to offer the same special contract terms to Wausau in order to mitigate what would otherwise be impermissible anti-competitive effects of the

Fraser agreement. Appended to the Wausau filing was the affidavit of David M. Atkinson, the mill's vice president of operations, describing the competitive disadvantages Wausau asserts it will face by virtue of the Fraser special contract.

In Order No. 24,151, the Commission deferred consideration of the issues raised by the Wausau filing and opened the instant docket for that purpose. See Order No. 24,151, slip op. at 15-18. The Commission entered an Order of Notice on March 27, 2003, scheduling a pre-hearing conference for April 4, 2003, establishing April 3, 2003, as the deadline for intervention petitions and establishing a tentative procedural schedule culminating in a hearing on April 23, 2003. The Commission Staff transmitted data requests to both PSNH and Wausau on March 28, 2003.

The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers on March 31, 2003. On April 3, 2003, the Commission received a letter from Sen. John Gallus, expressing support for "expedited approval" of a special contract for Wausau that would be similar to the one involving Fraser. There were no intervention petitions submitted prior to the pre-hearing conference, which took place as scheduled. At the pre-hearing conference, the Commission took up motions for confidential treatment submitted by Wausau

and PSNH in connection with certain responses to Staff discovery requests. The Commission orally granted both motions, subject to the customary proviso that the Commission retains authority to revisit the determinations at a later date upon request or on the Commission's own motion. The Commission also noted that it would take official notice of the record adduced in connection with Docket No. DE 03-064.

II. PRELIMINARY POSITIONS OF THE PARTIES AND STAFF

A. Wausau Papers of New Hampshire, Inc.

In summarizing its position at the pre-hearing conference, Wausau stressed the "real world consequences" of PSNH offering different and less advantageous terms to Wausau than it does to Fraser. Wausau noted that it bought the Groveton Mill in 1993 and has operated it continuously since then, investing \$68 million in mill improvements. Wausau contrasted this scenario to what has occurred at the paper mill in Gorham and the pulp mill in Berlin, which had undergone several ownership changes over the period, were idled as a result of bankruptcy proceedings in September 2001 and purchased the following year by Fraser.

According to Wausau, at least six and possibly as many as 10 of the products it produces in Groveton are in direct competition with the paper manufactured by Fraser in New

Hampshire. Wausau alleged Fraser has taken advantage of the newly approved special contract terms by under-bidding Wausau in connection with paper product sales. Wausau estimated that if it obtained the same special contract terms as Fraser, the resulting electricity sales by PSNH would contribute \$80,000 in stranded cost revenue that would be otherwise payable by customers taking service under PSNH's tariffs.

While characterizing the effect of the Fraser special contract as impermissibly anti-competitive with respect to Wausau, Wausau indicated that what remedy to impose should be left to the Commission's discretion. According to Wausau, the Commission could either order PSNH to grant the same special contract terms to Fraser or take some other appropriate action. Wausau characterized the objective of remedying impermissible economic harm caused by the Fraser special contract as "special circumstances" justifying a Wausau special contract pursuant to RSA 378:18.

B. Public Service Company of New Hampshire

PSNH took the position that it is not obligated by law to offer equal treatment to all customers. According to PSNH, RSA 378:11-a (authorizing Commission to approve economic development and load retention tariffed rates through December 31, 2002) required the Commission to take into account any

"materially adverse competitive impact" of such rates. The absence of such language from RSA 378:18 and RSA 378:18-a (authorizing special contracts involving electric utilities) is something the Commission should regard as deliberate, according to PSNH.

It is further PSNH's position that the factual record will not support a determination that Wausau and Fraser are direct competitors. PSNH noted differences in the situation of the two companies: specifically, the fact that Wausau does not operate a pulp mill in New Hampshire and has already installed sufficient cogeneration capacity to allow it to rely on PSNH solely for back-up power. PSNH noted that the purpose of the Fraser special contract is to provide a rate discount while Fraser embarks upon a similar cogeneration project with an identical objective. PSNH further noted that RSA 378:10 precludes "undue or unreasonable" preferences or advantages in utility rates, circumstances that it believes are not present here.

C. Office of Consumer Advocate

OCA noted that special contracts always involve the risk of undesirable cross-subsidies and/or effects on utility service. OCA further indicated that it opposes any special contract absent a demonstration that implementation of such a

contract provides benefits to other customers. Absent such a demonstration in this case, OCA expressed opposition to Wausau's request.

D. Staff

Staff took the position that the Commission may approve a new special contract involving an electric utility only upon a finding of "special circumstances" under RSA 378:18 and a determination under RSA 378:18-a that such special contract will either attract new load or cause the retention of load that would otherwise leave the utility. According to Staff, because Wausau has not made any of the requisite representations under RSA 378:18-a, it cannot be entitled to a special contract, even assuming the existence of RSA 378:18 special circumstances and assuming that the Commission has the authority to order an unwilling utility to enter into such an agreement with one of its customers.

Staff also took the position that the prohibition on preferential rates in RSA 378:10 is inapplicable because RSA 378:18 provides that "nothing herein" - i.e., nothing anywhere else in RSA Chapter 378 -- precludes an electric utility from entering into a special contract if such agreement meets the RSA 378:18 and RSA 378:18-a standards.

Additionally, according to Staff, it is not clear that RSA 378:18 and RSA 378:18-a authorize the Commission to require an unwilling utility to enter into a special contract with one of its customers. Staff suggested that the only relevant precedent is Order No. 23,255 (July 7, 1999) in Docket No. DT 99-086. *See New England Telephone & Telegraph Co.*, 84 NH PUC 375, *on reh'g*, 84 NH PUC 619 and 84 NH PUC 700 (1999), *aff'd sub nom. Destek Group, Inc. v. Verizon New England, Inc.*, 2001 WL 873067 (D.N.H. 2001) and 318 F.3d 32 (1st Cir. 2003) (concerning issues arising under federal Telecommunications Act). According to Staff, this case involved a proposed special contract between Bell Atlantic and the University of New Hampshire, involving a new service, and approved by the Commission on the condition that the utility make the service generally available via tariff. According to Staff, it appears this took place with the full assent of the utility. Thus, in Staff's view, the precedent is inapposite here, because there is no new service at issue and no willing utility interested in publishing a new tariff.

With respect to the provisions of the New Hampshire Constitution addressed in Wausau's initial filing (the equal protection provisions of Part I, Articles 1 and 2, as well as the "free and fair competition" provisions of Part II, Article

83), Staff cited *Eastern Utilities Associates*, 76 NH PUC 236, 254 (1991) for the proposition that the Commission is obligated to assume that all applicable statutes are constitutional. Staff agreed that Wausau is asking the Commission to interpret the statutory scheme in light of these constitutional provisions.

According to Staff, there may be a fundamental factual problem with Wausau's position, regardless of the legal basis of its argument. In Staff's view, it is not at all clear that Fraser and Wausau are so similarly situated that any constitutional or statutory provision requires PSNH to offer both companies the same rate.

III. PROCEDURAL SCHEDULE

At the pre-hearing conference, Wausau expressed concern with the procedural schedule outlined in the Order of Notice. According to Wausau, it is incurring significant economic harm as long as Fraser enjoys more favorable terms from PSNH than Wausau does. Therefore, Wausau asked the Commission to consider resolving the case on a more expedited basis than the one contemplated in the Order of Notice. Following the Prehearing Conference, the parties and Staff met in a Technical Session and agreed upon the following schedule in an effort to address Wausau's concerns:

Responses to pending data requests	04/07/03
Pre-filed testimony	04/10/03
Data requests	04/11/03
Responses to 4/11 data requests	04/14/03
Hearings	04/15 and 04/16/03

In view of the extremely expedited nature of the schedule, the parties and Staff agreed to circulate testimony, data requests and data responses electronically. The parties and Staff further agreed that the April 15, 2003 hearing would commence at 1:30 p.m. and the April 16, 2003 hearing, should it be necessary, would commence at 9:00 a.m. We have reviewed the Procedural Schedule as proposed herein and determine that it is reasonable in the circumstances. In addition, we offer the parties the opportunity to submit a brief of the legal issues in this case, which shall be due on April 11, 2003.

Based upon the foregoing, it is hereby

ORDERED, that the procedural schedule as proposed herein is reasonable and is hereby adopted.

By order of the Public Utilities Commission of New
Hampshire this seventh day of April, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary